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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 401

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

CELANESE CORPORATION OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW

The first opinion of the court of appeals, 279 F. 2d 404, and its subsequent opinion on remand, 291 F. 2d 224, are reprinted in the petition for certiorari (App. to Pet., pp. 22-33). The decision of this Court, 365 U.S. 297, remanding the case to the court of appeals and the text of its opinion in *National Labor Relations Board* v. *Mattison Machine Works*, 365 U.S. 123,

which that court was directed to consider, appear in the appendix to this brief (App. A and B, *infra*, pp. 1a-2a). The findings of fact, conclusions of law, and order of the Board (J.A. 85-97, 103-105)[1] are reported at 125 NLRB 352. The Board's decision in the representation proceeding (J.A. 64-72), which forms part of the record here, is reported at 121 NLRB 303.

QUESTION PRESENTED

Petitioner's phrasing of the "Question Presented" implies that this Court had previously held that the court below had "misconceived" the function of a reviewing court when it is apparent that all this Court had done was to send the case back for clarification. Accordingly, it is submitted that the real question is as follows:

Whether the court below, when the case was remanded to it "for consideration in the light of *Labor Board* v. *Mattison Machine Works*", 365 U.S. 123, correctly concluded that it was required to determine whether on the record as a whole there was substantial evidence to support the challenged order of the Board and to set aside the order of the Board in the absence of such evidence.[2]

COUNTER-STATEMENT OF THE CASE

A. The Disputed Election

On March 12, 1958 the Board, acting upon a petition of the Textile Workers Union, AFL-CIO, conducted an election among the employees of the re-

[1] "J.A." refers to the portion of the record printed as the Joint Appendix in the court below.

[2] Respondent does not differ with what Petitioner states with respect to "Jurisdiction" and "Statute Involved".

spondent Company at Gallipolis Ferry, West Virginia, one of several manufacturing establishments operated by respondent (J.A. 6, 107, 111). Of the forty-seven (47) ballots cast, twenty-five (25) favored the Union and twenty-two (22) opposed the Union (J.A. 6). There were no void or challenged ballots (J.A. 6). A change in two (2) votes would have changed the results of the election.

Prior to the election eleven (11) letters were circulated by the Company to the employees, designed to review the facts concerning wages, fringe benefits, and working conditions of the employees. In brief, these letters explained the Company's method of maintaining full employment even during business dips by the use of outside contractors whose services could be eliminated during periods when production was reduced (J.A. 36-38); the disciplinary policies with respect to job security (J.A. 39-40); promotions through the posting of job opportunities (J.A. 41-43); the hospitalization and group insurance program, the cost of which was borne entirely by the Company (J.A. 43-44, 48-51, 51-54), and its retirement program (J.A. 43-44); the Company efforts to provide better working conditions and conveniences for its employees, including its financial assistance to a recreational club for employees (J.A. 43-44); its practice of avoiding layoffs by assigning work to employees in jobs other than their primary ones (J.A. 45); its seniority policies and welder training program (J.A. 46-47); pay for jury duty, funeral leave, premium pay for second and third shifts, and two-and-a-half times pay for work performed on recognized holidays (J.A. 48-51); its wage program and wage rates (J.A. 48-51, 55-58).

Three of the Company's letters were devoted in whole or in part to the Company's group hospitalization, surgical, and life insurance programs (J.A. 43-44, 48-51, 51-54).[3]

The union distributed two letters to the employees (J.A. 59-63). The second letter (to which the Company objected) was dated March 10, 1958 (J.A. 61). It was delivered by hand to some 20 of the employees on March 10 (J.A. 92, 115) and was presumably received by the rest of the employees on March 11, the day before the election, since the remainder of the letters sent to the employees were deposited in the mail box near the plant at 6:30 P.M. on March 10 (J.A. 92, 115).

The letter claimed that "Celanese fringes" and "other plant conditions" had been won by the union through collective bargaining (J.A. 61), stating in part:

> ". . . He [the plant manager] says that *all of the fine fringe* benefits show the Company's interest

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[3] The supposedly objective description of these letters contained in the petition for certiorari under the caption "Statement" is marred by one glaring inaccuracy when it refers to a summary in the final Company letter of "the various benefits discussed in earlier letters" and a restatement of "its attitude toward them as follows (JA 56):

> "These changes were made because of our progress as individuals working for our Company and not because a labor organization demanded that they be done."

As the text of this letter reveals, the changes in question related to certain revisions in the pay and holiday schedule at the particular plant described in some detail in the two paragraphs immediately preceding the sentence quoted in the Petition (p. 3). In other words, this sentence did not refer at all to the "various benefits discussed in earlier letters". This same contention was advanced by Board counsel in the first argument before the court below and was rejected by the court (see App. B, Pet., p. 32).

> in your concern. This could be something less than the truth, for the fact is that *Celanese fringes*, as well as other plant conditions, were won through collective bargaining, and in many instances over the initial opposition of the Company.
>
> "Mr. Pearson, the plant manager, does not know much about this, since many of the gains won by the Union for Celanese workers date back to a time when he was just a youngster . . ." (Italics supplied)

The Company was not informed of this letter until about 1:30 P.M. on March 11, 1958 (J.A. 92, 113), the day preceding the election. At this time, eight employees were not in the plant (J.A. 112). By 3:00 P.M.—one and a half hours after the letter reached the Company—five additional employees, comprising the production day shift, had left the plant (J.A. 113). By 4:00 P.M. seventeen more employees, comprising the bulk of the maintenance and warehouse group, had completed their shifts (J.A. 113). By 6:00 P.M. only the regular shift of six people remained in the plant (J.A. 113). In short, by 4:00 P.M. 30 employees had left the plant for the day; by 6:00 P.M. the number had increased to 35 employees. None of the employees who had left the plant was scheduled to reenter the plant before the day of the election, when the polls were scheduled to open at 6:30 A.M. (J.A. 113).[4]

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[4] The trial examiner, whose decision and recommendations were adopted by the Board, conceded that ". . . the Respondent did not have sufficient time before the election to reply to the Union letter . . ." (J.A. 92).

B. The Proceedings Before the Board

The Company filed objections to the election, alleging that on the eve of the election the Union had circulated among the employees a letter which contained misrepresentations of fact on material issues involved in the election, thereby affecting the results, so that the tally of ballots did not comprise a true determination of the wishes of the employees with respect to representation by the Union (J.A. 4-5).

On April 7, 1958 the Regional Director of the Board issued a report on objections (J.A. 6-18). The report contained no flat findings of fact concerning the truth or falsity of the Union's assertions, but rather recommended that the Board overrule, without hearing, such objections on the ground that they did not raise "any material or substantial issue with respect to the results of the election" (J.A. 11).

The Company filed exceptions to the Regional Director's Report, together with a supporting brief and request for oral argument before the Board (J.A. 19-63). In support of its contention that the Union misrepresented the origin of employee benefits enumerated in the Company letters, the Company submitted in its brief[5] that it had provided for its employees unilaterally as a result of Company policy rather than collective bargaining a comprehensive retirement plan and a program of group insurance covering hospital, surgical and polio expense benefits, life insurance, accidental death and dismemberment benefits, accident and

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[5] Inasmuch as no hearing had been held on the issues raised by the Company, the only means whereby the Company could support its contention was through written argument to the Board and its representatives.

sickness benefits (J.A. 27),[6] as well as other important fringes (J.A. 27, 28). It pointed out that these benefits had not been "won through collective bargaining" in any of its plants as the Union had erroneously claimed in its letter of March 10 (J.A. 28).

On August 6, 1958, without affording the Company any hearing, the Board denied the request for oral argument, overruled the Company's objections, and issued a certification that the Union was the majority representative of the employees (J.A. 64-72).

Thereafter, the Company declined to meet with the Union for the purpose of collective bargaining because it believed that the Union did not represent a majority of the employees in the stipulated unit (J.A. 75-76, 131-132). A complaint issued charging a refusal to bargain under Sec. 8(a)(5). (J.A. 72)

In the subsequent hearing, the Company pointed out that the Board's own stated election policies required the setting aside of an election where—

(1) there has been a material misrepresentation of fact,

(2) this misrepresentation was made by a party who had special knowledge of, or was in an authoritative position to know the true facts,

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[6] The aforementioned benefits were enumerated in the letters sent by the Company on February 25, March 4 and March 6 (J.A. 43, 49, 51-54).

(3) no other party had sufficient opportunity to correct the misrepresentation before the election.[7]

The Company then produced evidence to show that the chief fringe benefits it had emphasized in its letters, viz., the employee hospitalization, medical and life insurance plan and the retirement program, had never been the subjects of collective bargaining in any of its plants (J.A. 123-124) and accordingly the Union's last minute boast that "Celanese fringes" had been won through collective bargaining amounted to a material misrepresentation.

On the second point the Company's evidence showed that the Textile Workers Union was known to be the bargaining representative of employees in several other Celanese plants (J.A. 120) and consequently the workers in this plant might well assume that it spoke with knowledge of the true facts. Evidence was also presented to demonstrate that time did not permit any rebuttal of the false statement before the polls opened (J.A. 111-115), thereby establishing the third element.

The trial examiner, although conceding that there was no opportunity for rebuttal, failed to make any firm finding on the issue of whether the union had made a material misrepresentation. Following the lead of the Board in its opinion dismissing the objec-

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[7] These standards, previously announced in such cases as *Gummed Products Co.*, 112 NLRB 1092; *Reiss Associates, Inc.*, 116 NLRB 217; *Calidyne Co.*, 117 NLRB 1026, and elaborated upon in successive Annual Reports of the Board, are still the operative tests. See *United States Gypsum Co.*, 130 NLRB No. 99, App. C of this brief, pp. 2a-12a. These were the rules the court below accepted when the case was before it for remand. Petitioner concedes that they were in effect all during the relevant period of this case, but contends that a reviewing court has no authority to inquire into their application (Pet for Cer., p. 12).

tions (J.A. 64, 67), the trial examiner advanced the view that the union's letter should be read as claiming that *some* rather than *all* of the benefits granted by the Company were the result of collective bargaining with the union (J.A. 89).

Apparently aware that such a reading was certainly not literal and obviously would not have produced the impression upon the employees the Union was trying to convey, the trial examiner reasoned that even if the Union was claiming credit for all enumerated benefits, "the Union's claim at most amounted to a half truth" (J.A. 91). He then went on to find that the other two factors were not present because—(a) it was unlikely, he said, that the workers would attach special weight to the union's version as against Respondent's version, since they knew that Respondent as well as the union must have been a party to the bargaining in question (J.A. 92); and (b) although agreeing that the Company did not have sufficient time before the election to reply to the union letter (J.A. 92), such an opportunity was unnecessary, he said, because the Company had already presented its version of the facts to the employees (J.A. 92-93). This conclusion was based on the finding that "implicit" in the Company's letters is the theme that "the employee benefits recited . . . were voluntarily granted by Respondent alone without benefit of collective bargaining" (J.A. 93).

In its exceptions, Respondent pointed out that there was nothing in the record to support this finding, for at no time had the Company advanced the claim that the benefits in effect at the Gallipolis plant had not been the subject of collective bargaining at other locations and accordingly the last minute letter of the union had injected a new issue upon which it had no

opportunity to comment (J.A. 101). Nevertheless the Board, without adverting to this point, adopted the trial examiner's findings and intermediate report *in toto* (J.A. 103-104).

C. History of the Case in Review

On June 16, 1960, the Court of Appeals for the Seventh Circuit set aside the Board's order. It found that the disputed union letter could not be reasonably read as claiming credit for only "some of several" fringe benefits and held that the union's claim constituted a significant and material misrepresentation. It further observed that "[c]haracterizing the claim as a 'half-truth' does not confer upon it the veracity demanded in respect to material statements made immediately prior to a representation election".

Noting the trial examiner's finding of a Company implication that it had voluntarily granted the benefits without collective bargaining, the court pointed out that the Company's reference to the absence of a union demand in the final letter referred only to the wage changes discussed in that document, and that what the Company was conveying to the employees was the fact that they were enjoying existing benefits without union representation at their own plant (Pet. App. B, pp. 31-32).

Just before the summer recess in 1960, this Court granted a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit in *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, a case involving an inaccurate designation of the employer's name on election notices. Thereafter, the Board filed a petition for a writ of certiorari to review

the Seventh Circuit's decision of June 16, 1960 in the instant case.

Shortly after this Court reconvened for its fall term in 1960, it heard oral argument in *Mattison*. Board counsel on that occasion contended that the court of appeals decision in this case was also based on the same rationale. Because the petition for the writ was still pending before this Court at that time Celanese counsel had no opportunity to reply.

On January 23, 1961, this Court reversed the judgment in *Mattison* in a *per curiam* opinion. On February 20, 1961 a writ of certiorari was granted in the instant case, and without a hearing on the merits, the judgment of the Seventh Circuit was vacated and remanded to that court for consideration in light of the *Mattison* decision.

Upon remand the court of appeals, after receiving memoranda filed by the parties and hearing oral argument, issued its decision on June 14, 1961. Explicitly considering the case in the light of the *Mattison* decision, the court concluded that the Board order should be set aside. This time the court precisely articulated its theory governing review of Board orders, with particular reference to and adoption of the standard enunciated in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. It noted that the Board is given wide discretion in the promulgation of rules governing the conduct of elections. Then turning to the application of the Board's rule in the instant case, the court held that the findings and conclusions of the Board with respect to the application of the rule which it had promulgated were not supported by substantial evidence on the record considered as a whole.

ARGUMENT

It is submitted that the reasons advanced by Petitioner for granting a writ of certiorari are not well taken. Its contention here is not that the factual findings assigned as the basis for the Board's refusal to hold that its rules against pre-election misrepresentations were violated, were supported by substantial evidence in the record as a whole. It argues that despite the fact that this is the standard for review prescribed by Sections 10(e) and (f) of the Act, the court below erred in applying this test where such findings related to issues arising in a representation proceeding. Petitioner regards such findings as binding upon reviewing courts unless "arbitrary and capricious."

Acceptance of this thesis would create a limitation upon the authority of courts of appeal in Section 10(e) and (f) proceedings which does not appear in the text of those subsections nor is suggested in any way by the opinion of this Court in the leading case, *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. Moreover, the proposed new standard is also at odds with the Administrative Procedure Act. While it is true that Section 10 of the Administrative Procedure Act does, (5 U.S.C. § 1009), as petitioner points out (Pet., p. 14, n. 7), recognize a distinction between a substantial evidence question and one involving an abuse of administrative discretion, Section 10(B)(e) of that Act provides that an agency action shall be set aside by a reviewing court if the findings and conclusions of the agency are found to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (5) unsupported by substantial evidence . . .". If petitioner is correct, clause (5) of Section 10(B)(e) has no application to the pro-

ceedings in the court below. This court has held precisely the contrary. *Universal Camera*, 340 U.S. 474 at 487 and 490.

1. The Court Below Gave Full Effect to the Rule of the Mattison Case

Petitioner relies upon this Court's holding in the *Mattison* case as support for its novel proposition that the Board's decision here must stand unless its action was "arbitrary and capricious" even if unsupported by substantial evidence.

Far from constituting a wide reaching exposition of general principles applicable to the review of Board orders based in part on findings in a representation proceeding, the *Mattison* decision was a carefully limited one. The Court said that the "notices of election contained a minor and unconfusing mistake in the employer's corporate name"; sustained the finding of the Board that such an occurrence "had not affected the fairness" of the election; and held that in the absence of a showing of "prejudice to the fairness of the election such trivial irregularities of administrative procedure" did not justify the reversal of the Board by the Seventh Circuit.

From this short admonition Petitioner has somehow developed the notion that the Board's subsidiary findings in a representation matter, even though plainly at variance with the evidence, are immune from judicial review.

Any such interpretation of *Mattison* is far fetched. The court of appeals had acknowledged in the decision later reversed by this Court, that "it may well be that the irregularity complained of resulted in no confusion to respondent's employees" and declined to "give the stamp of our approval to the Board's rejec-

tion of the objection as 'nonprejudicial error' when there is nothing in the record to support such a conclusion". It was presumably the court of appeals' readiness to reject a finding of the Board in the absence of a showing by the objecting party that the irregularity operated more to its detriment than that of the winning side which precipitated the reversal by this Court.

Mattison is further distinguished by its concern solely with the mechanics of an election. It is in these phases of election procedure that the Board's rulings with respect to voting eligibility have received some special weight. *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, urged by the Board as support for its position here, was merely an affirmance of a ruling that the company by waiving its right under Board rules to challenge a non-employee at the polls was thereby estopped from protesting the inclusion of this vote in the tally of ballots.[8]

The Board, however, would ignore the vital distinction between the administrative discretion granted it in determining the kind of bargaining units that are appropriate or in framing rules regarding the mechanics of an election, on the one hand, and its duty of passing upon evidence in a particular case respecting an asserted deviation from its unit definitions or its election rules. The latter is a fact-finding function and if such findings are later used as the basis of an unfair labor practice order, they are subject to judicial reversal if not supported by the kind of evidence the statute requires.

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[8] Similarly the propriety of rules relating to such mechanics as the payroll date and voting eligibility rather than a failure to apply them constituted the issue before the court in *N.L.R.B.* v. *National Plastic Products*, 175 F. 2d 755, from which Judge Parker's quotation is cited in the Petition.

In the *Mattison* case, moreover, the Board did have substantial evidence for its holding that the incorrect description in the name of the company was not prejudicial to the party protesting the election result, viz, (1) the inaccuracy was so slight that it could scarcely have been inferred that the employees would have thought that some company other than their own was involved, and (2) if there was any confusion, it would scarcely operate to the disadvantage of one side rather than the other. Hence in referring to "the absence of any contrary showing by the employer", this Court was in effect saying that the Board's findings in *Mattison* had met the statutory test.

The record in the instant case, however, is clearly distinguishable. Here, as the court below noted with specific reference to this Court's observations in *Mattison*, the challenge to the election results was not based on some showing of "trivial irregularities", but rather upon "material misrepresentations of fact". The Board's finding to the contrary rested solely upon a distorted and strained reading not only of the union's letter but also of the company's circulars. The testimony offered here by the employer deprived the Board findings of substantial evidentiary support and demonstrated that under the ordinary inferences the Board itself would draw, the fairness of the election was prejudiced to the disadvantage of the respondent.

Accordingly it is clear that the court below did take into account in its rehearing of this case, all the factors mentioned by this Court in *Mattison*—"triviality", "lack of prejudice", "absence of a contrary showing by the party on whom the burden of proof rested"—as grounds for deferring to the Labor Board's judgment, even though it might have disagreed with it. It

did not, it is true, conclude that it was also under a duty to sustain Board findings devoid of substantial evidentiary support. But it is also plain that the *Mattison* opinion, which it had been directed to consider, neither advised nor hinted at the adoption of so narrow a course of action.

2. Petitioner's Position Ignores the Purpose of Section 9(d) of the Act

The Board has come full circle in its campaign to render any of its actions in representation proceedings immune from judicial review. In *Leedom* v. *Kyne*, 358 U.S. 184, the Board argued that the courts had no jurisdiction to enjoin a certification based upon a direction of election which, *ex hypothesi*, was contrary to the Act, urging that the challenge to its action could only be considered by the courts if the parties refused to abide by the certification and were subsequently adjudicated by the Board in a final order under Section 10(e) of the Act to have committed an unfair labor practice. It was pointed out that under Section 9(d) of the Act, if such a final order were based in whole or in part upon findings in a representation proceeding, the record of such proceeding would be incorporated in the transcript of the unfair labor practice proceeding. This is precisely what was done in the instant case.[9]

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[9] Sec. 9(d) "Whenever an order of the Board made pursuant to section 10 is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

Implicit in the Board's contention in *Leedom* v. *Kyne* was that a party aggrieved will ultimately have an opportunity for complete judicial review under this statutory scheme, if his objections to the validity of the certification are overruled by a Board order holding that there had been a refusal to bargain. The dissenting opinion of Mr. Justice Brennan (with whom Mr. Justice Frankfurter joined in that case) was predicated upon the premise that since Section 9(d) preserved an opportunity for judicial review in the usual course of a petition for enforcement under Section 10(e), or a petition for relief under Section 10(f), Congress had not intended any judicial remedy against improper certifications unless the findings upon which they were based were subsequently drawn into issue in a Section 10(*e*) proceeding. With obvious inconsistency, however, the Board is now insisting that even the indirect review of a representation finding, which the Board told this Court in the *Kyne* case was available under the circumstances specified in Section 9(d) of the Act, is not obtainable except where a question of arbitrary or capricious action is present.

Petitioner's theory of the role of a reviewing court is a strange one. Paradoxically the Board now assails the court of appeals for applying the Board's own rules for determining whether or not an election reflects the free choice of the employees. It takes the court to task for ruling that an election must be set aside if the three requirements laid down by the Board are met, viz., (1) a material misrepresentation of fact (2) coming from a party in an authoritative position to know the true facts (3) at a time when the other party would have no opportunity to correct the misrepresentation, and says (Pet. 12):

> "The Court's mistake was to accept the Board's tests as absolute principles for the court's application, rather than as a formulation of the Board's own reasons for believing that an election might not be free and fair. . . .
>
> "The important question concerning the union's letter was not its abstract meaning or legal effect, but the impact which it was likely to have upon the employees' minds. This was a question calling for an informed and experienced administrative judgment directed to the ultimate issue whether it was likely to render the election unfair."

These quoted portions of the Board's petition give a misleading picture of the grounds on which the Board's decision rested.

It is true that the ultimate question which the Board was called upon to decide was the likely impact of the Union's asserted misrepresentation upon the minds of the voters. The Board, however, had adopted a formula for determining this, namely that misrepresentation *per se* was not sufficient to avoid the results of an election unless the two other elements previously mentioned were present. The Board, by adopting the findings of the trial examiner that these two factors were not present here, concluded on this basis alone that the employees' minds had not been unduly affected. Thus the implication in the petition that even in a disputed election, where all three elements existed, the Board was free to ignore these circumstances and to rely upon its "informed and experienced judgment" is not a description of what actually took place. The text of the trial examiner's decision, accepted without comment by the Board, reveals that the Board rested its ultimate conclusion on findings that the circum-

stances in which it would ordinarily set aside elections had not occurred in this case. Thus its conclusion depended upon findings which the court below found not supported by substantial evidence.

The "informed and experienced administrative judgment" which the Board maintains it possesses was manifested in its promulgation of the rule. The rule itself is the Board's measure of the "impact" upon employees' minds. The court, far from elevating the Board's rule to the stature of a statutory requirement as petitioner has suggested, merely held itself bound by the Board's rule but not by its evidentiary findings as to the rule's application.[10] The Board in effect contends that a court of appeals is incompetent to determine whether a falsehood is material, whether it comes at the last minute, or whether the party circulating the falsehood was in an authoritative position to know the true facts. Surely once the Board has stated the ground rules for the controversy, it should have no standing to contend that its later findings on a question of whether such rules have been complied with are beyond the scope of judicial review when such

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[10] The Board's attempt to disavow its own rule comes with particularly ill grace in view of the fact that it once again adhered to the rule in its brief to the court subsequent to the remand order. It stated:

> "Where, however, special circumstances occur which impair the ability of the employees to evaluate the propaganda—that is, where both a material misrepresentation has been made so soon before the election that the other side could not reply, *and* the employees in all probability gave particular weight to the misrepresentation because its source had special knowledge of the true facts—this premise is no longer true, and the Board will require a new election. See *Merck & Co.*, 104 NLRB 891, 892; *Gummed Products Co.*, 112 NLRB 1092, 1093-1094." Memorandum of Board, p. 7.

findings are purportedly based on evidence in the record.

On remand, the court below drew the proper distinction between the area in which deference should be accorded the Board's discretion and that in which the court exercises its traditional reviewing function. The Court observed (Pet. 23-24):

> "There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives as enunciated in *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946). These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board."

Adhering to the dictates of the *Universal Camera* case, it found that the evidence in the record would not support the Board's judgment.

Although the Board apparently has not the temerity to take issue with the standards of *Universal Camera* in other types of unfair labor practices, it has attempted to demonstrate a unique quality to cases such as the one at bar to demonstrate the need for different

criteria. Upon examination these distinctions are transparent and unavailing. The Board states (Pet. 13-14):

> "The review of the findings of fact describing motives and evidence presents problems different from reviewing an administrative certification of representatives. In the former case the problem is largely one of weighing conflicting testimony, or the inferences to be drawn from testimony, under the circumstances disclosed by the record. In a representation proceeding there is seldom much dispute about what happened; the agency makes a discretionary judgment based upon evidence; the question on review is whether that judgment was reasonable and was confined within the statutory limits."

Particularly in view of the *Radio Officer's* case,[11] where this Court held that "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership . . .", 347 U.S. at 45, the Board's alleged distinction between determining motivation in cases of unfair labor practices and inferring consequences in election campaigns borders on the frivolous. Non-election unfair labor practices require precisely the same drawing of inferences of probable consequences that is presented here. Courts are constantly called upon to weigh Board determinations of whether an employer's anti-union statements, reprimands to employees, or threatened plant shutdowns, are inherently coercive and illegal or within the realm of non-coercive opinion. In such cases the courts must measure the "impact" of the

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[11] *Radio Officer's Union of Commercial Telegraphers Union* v. *N.L.R.B.*, 347 U.S. 17.

employer's communications upon employees, and do so by weighing the Board's determination of foreseeable consequences in terms of the substantiality of the evidence supporting it.

The Board is in error when it states (Pet. 13) that the formula of *Universal Camera* "has not heretofore been applied to representation proceedings". In the recent case of *Cross Company* v. *N.L.R.B.*, 286 F. 2d 799, decided after this Court's *Mattison* decision was handed down, the Court of Appeals for the Sixth Circuit explicitly applied the substantial evidence requirement of *Universal Camera* to the Board's inferences of election fairness and reversed the Board's holding that campaign misrepresentations did not invalidate a representation election. Indeed, it was precisely this principle that was applied by Judge Parker in *N.L.R.B.* v. *National Plastic Products Co.*, 175 F. 2d 755, 758, cited by petitioner (Pet. 14). He stated:

> "The certification must be sustained insofar as fact questions are concerned, *if the fact findings of the Board made in connection therewith are based upon substantial evidence.*"

The Board cannot escape the consequences of its misapplication of its own rules by disavowing such rules as of non-statutory origin. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260; *Service* v. *Dulles*, 354 U.S. 363. Its ultimate conclusion with respect to the fairness and validity of an election does not arise in a factless vacuum, but must be predicated upon subsidiary findings. Inasmuch as these underlying findings were challenged by a court which applied the statutory test for review, the Board has no basis for complaint whatsoever.

3. The Holding of the Court Below Was Plainly Correct

Petitioner's attempt to defend the merits of the Board's decision (Pet., pp. 15-17) seems to imply that its reversal by the Court of Appeals was due to an assumption on the part of the judges that any misstatement made in an election campaign is enough to invalidate the results. An examination of the court's opinion (Pet. App. pp. 24-25) shows that this was not its approach. The court accepted the very criteria for appraising the effect of campaign propaganda which the Board itself had adopted (id, p. 25).

The court observed, however, that its first holding that the Union had engaged in misrepresentation was not challenged by the Board on remand. In that earlier opinion the court applied the very test for which the Board is now contending, viz., "reasonableness", with respect to that issue. The Board (and the trial examiner) had suggested that the Union letter could be read as merely a claim by the Union that "some" Celanese fringes have been won through collective bargaining. In repudiating such an interpretation the court, pointing to the absence of any limiting adjective, declared

> "In light of the immediately preceding reference to 'all of the fine fringe benefits', the challenged statement cannot reasonably be construed to refer to less than 'all' Celanese fringes."[12]

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[12] The only reason the trial examiner gave for suggesting that the employees would have attributed such a limited meaning to the Union's claim was that some of the Company's letters had mentioned benefits "of such a nature that the employees could not reasonably have believed that the Union was claiming credit for them, e.g., a disciplinary procedure handled entirely by manage-

It was on this basis, namely that the Board's construction of the written documents was not reasonable, that the court found that there was substantial evidence that a material misrepresentation had been made and an absence of such evidence to support any contrary construction of the Union letter.

The Board's contention (Pet. p. 16-17) that even granting the falsity of the statement "no reply was required to counter the effect . . . ." rests solely on its reading of the Company's letters as advancing the claim that none of the benefits recited had been the product of collective bargaining (J.A. 93). The court correctly pointed out that this was not so, and that what the company was telling the employees was that in their plant—where there was no bargaining representative—it had conferred these benefits on them voluntarily (Pet. 31-32). Obviously the Union was not contradicting this statement for its truth was obvious. What its last minute letter did do was to introduce a new issue by telling the employees that all the fringe benefits they were enjoying had been won by union bargaining at other plants.[13] Inasmuch as the Company had never made any statement as to how fringe

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ment . . . improvements in the physical facilities in the plant." (JA 89).

Obviously the Union letter would not have referred to such matters as "fringe benefits" or "Celanese fringes". What are commonly called "fringe benefits" are such items of indirect remuneration as paid vacations and holidays, pension plans, health and welfare benefits, supplementary unemployment compensation, etc. (See Chapter 209, *Fringe Benefits Under Collective Bargaining*, Bureau of Labor Statistics Bulletin No. 1225.)

[13] On this point, the court below said in its first opinion (Pet. App. 31):

> "There had been no union and no negotiations with any union concerning the particular employees involved at the Point Pleasant plant. Apparently the Union is referring to some dealings of the Company and unions at other plants."

benefits in other Celanese plants had originated, the employees were never "presented with *conflicting contentions* which they were free to evaluate" (Pet. 17). Hence the finding that it was not "likely that the employees would attribute more significance to the Union's version than to the Company's" (Pet 17) had no evidence to support it, for the employees were never furnished the Company's version. By the same token the finding that the Company needed no opportunity to rebut, since it rested on the same false premise, could not be sustained by the reviewing court.

Thus an examination of the record reveals that the Board had no reasonable basis for reaching the conclusion that it did. Its reading of the Union letter was obviously distorted, misconstrues its wording, and overlooks the obvious purpose of the Union in using the offending phraseology. The meaning the Board attributed to the Company letters shows that, unlike the reviewing court, it never carefully examined their text. Had it done so, it could never have made the finding that the Company was advising the employees that none of the benefits they enjoyed had been obtained at other locations by collective bargaining.

Conceivably the court of appeals might well have characterized the action of the Board in this case as "unreasonable, arbitrary and capricious" as well as unsupported by substantial evidence, had it not been deterred by Board counsel's inability "to think of any example of extreme arbitrariness or capriciousness, which, in his opinion, would warrant setting aside an order". (Pet. App. p. 24).

The essence of the "arbitrary and capricious" standard is that agency rules must be administered in an evenhanded fashion. Yet, subsequent to its decision in

the instant case, the Board in *United States Gypsum*, 130 NLRB No. 99, was confronted with almost identical issues and arrived at just the opposite conclusion.[14] Accordingly, it is submitted that the record in this case does not present the important federal question which Petitioner has elicited from it, for the decision

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[14] In early March, 1961, the Board in *United States Gypsum Company*, 130 NLRB No. 99, utilized the very rule involved here to set aside an election where an employer had circulated copies of telegrams containing material misstatements of fact. In that case (reprinted in its entirety as Appendix C) the employer published a telegram from its works manager at another plant, asserting that the international union permitted the local no voice in collective bargaining and had vetoed a wage increase for employees at that location. The telegram was found by the Regional Director to contain "gross misstatements, misleading statements, and deliberate misrepresentations".

The Board reiterated its familiar practice as follows:

> ". . . when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack the independent knowledge to make possible a proper evaluation of the misstatements, the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election."

Applying this rule, which Celanese vainly invoked before the Board here, the Board found in *Gypsum* that the employees could not evaluate statements regarding conditions at a remote location, even though the petitioning union was situated there. It then observed that "in any event we find that it is immaterial which party had special or exclusive knowledge of the facts", and went on to say:

> "While a party is not necessarily entitled to an opportunity to reply to all campaign propaganda, the Petitioner was entitled to such an opportunity under the circumstances of this case . . . In this connection the Regional Director found that there was some evidence that during the campaign the Employer had mentioned its contentions that the International would conduct any contract negotiations, but that this issue did not assume a dominant role in the Employer's campaign until the receipt of the July 6 telegram."

of the court below could well be sustained on the limited standard for judicial review which Petitioner contends is proper. It is respectfully submitted that if this court is to consider adequately the drastic limitation upon the scope of review which Petitioner is urging, it should also have before it the decision of the Sixth Circuit in *Cross Company* v. *N.L.R.B.*, 286 F. 2d 799, rehearing denied 288 F. 2d 188. Yet the Board saw fit not to petition for writ of certiorari in that case although the standards for review enunciated there are precisely the same as in this one.[15]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[15] On July 10, 1961 the Board filed an application in *Cross* for an extension of time in which to file a petition. An extension to September 12, 1961 was granted by Mr. Justice Frankfurter. As no petition was ever filed, the case has no docket number.